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No. 92-1275

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARTHUR V. DEUTCSH, R L WEBB, and JULIUS WALKER,
Petitioners

v.

VALINDA F. OLADEINDE and PATRICIA L. FIELDS,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal court refuse to order dismissal of a complaint against local government officials, when the court cannot conclude that the complaint complies with the mandatory language of Federal Rule of Civil Procedure 8(a)(2) but indeed admits to serious doubt about such compliance?

2. May local government official defendants be made to bear the burdens of defending a suit under 42 U.S.C. § 1983, when the plaintiffs repeatedly fail to set forth a short and plain statement of the basis for their claims, in violation of the Federal Rules of Civil Procedure and instructions from the Courts?

3. Should a complaint be dismissed with prejudice when the plaintiffs, represented by experienced counsel, repeatedly fail to comply with the pleading requirements of Fed. R. Civ. P. 8 and the instructions of the courts, made directly to them, as to proper pleading?

PARTIES

The plaintiffs are Valinda F. Oladeinde and Patricia L. Fields. The defendants are the City of Birmingham, Alabama; Mayor Richard Arrington, Jr.; former Chief of Police Arthur V. Deutcsh; Captain R L Webb; and Captain Julius Walker. The individual defendants are sued in their individual and official capacities. Deutcsh, Webb, and Walker are the petitioners; Oladeinde and Fields are the respondents.

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OCTOBER TERM, 1992

No. ———

ARTHUR V. DEUTCSH, R L WEBB, and JULIUS WALKER,
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v.

VALINDA F. OLADEINDE and PATRICIA L. FIELDS,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Arthur Deutcsh, Captain R L Webb, and Captain Julius Walker hereby petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, enabling this Court to review the judgment in *Oladeinde v. City of Birmingham*, 963 F.2d 1481 (11th Cir. 1992), *reh'g and reh'g en banc denied*, 978 F.2d 718 (11th Cir. Oct. 30, 1992) (table).

OPINIONS OF COURTS BELOW

The only reported opinion in this case is that of the United States Court of Appeals for the Eleventh Circuit, *Oladeinde v. City of Birmingham*, 963 F.2d 1481 (11th Cir. 1992), *reh'g and reh'g en banc denied*, 978

F.2d 718 (11th Cir. Oct. 30, 1992) (table). This is the judgment of which review is sought.

Other relevant unreported opinions are set forth in the appendix. These include the opinion of the United States District Court refusing to dismiss the original complaint, and certifying that ruling for appeal pursuant to 28 U.S.C. § 1292(b) [App. B, p. 12a]; the order of the Court of Appeals denying permission to appeal from that ruling because the complaint was so inadequate that one could not determine what issues of law might be controlling [App. D, p. 19a]; and the subsequent order of the District Court refusing to dismiss the amended complaint [App. C, p. 17a].

The appendix also includes the amended complaint, the sufficiently of which is at issue [App. F, p. 23a].

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on June 24, 1992. The Court denied rehearing on October 30, 1992.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Fed. R. Civ. P. 8 provides, in relevant part:

> (a) Claims for relief. A pleading which sets forth a claim for relief, whether an original claim, counter-

claim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . .

(e) Pleadings to be Concise and Direct . . .

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

STATEMENT OF THE CASE

This case arises under 42 U.S.C. § 1983. It was brought in the United States District Court for the Northern District of Alabama, which had jurisdiction under 28 U.S.C. § 1331. The plaintiffs are one present police officer and one former police officer [1] of the City of Birmingham, Alabama; they sued the City of Birminghame, its Mayor Richard Arrington, Jr., its former Chief of Police Arthur V. Deutsch, Captain R L Webb, Commander of the Internal Affairs Division of the Birmingham Police Department, and Captain Julius Walker, Commander of the Vice and Narcotics Division of the Birmingham Police Department. The individual defendants were sued in their individual and official capacities.

The complaint (including one early amendment), in one count and 19 pages long, alleged adverse employment actions taken against the plaintiffs. The nature of the alleged adverse employment actions, who was alleged to have taken such actions, and the alleged factual basis for the claim that such actions violated federal law, were unclear; the complaint invoked in passing the concepts of "free speech," "due process," "freedom of association" and "equal protection."

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[1] The former police officer voluntarily retired from the City during the pendency of this case and now draws a pension from the City of Birmingham, while she also receives a full-time salary from another municipality.

The District Court refused to dismiss the complaint, but certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). In an unreported order, the United States Court of Appeals for the Eleventh Circuit denied permission to appeal, on the grounds that the complaint did not comply with the Federal Rules of Civil Procedure; indeed, the Court of Appeals explained, it could not even tell what the case was about. The Court held,

> The complaint, as amended, in this case . . . is a typical "shotgun" pleading, *see Pelletier v. Zweifel*, 921 F.2d 1465, 1518-19 (11th Cir. 1991), in that, in *one* count, the plaintiffs have presented multiple claims for relief, supporting them with a rambling set of factual allegations that may or may not be relevant to each claim. Accordingly, it is virtually impossible for us to know what "question of law" might be "controlling" with respect to the *merits* of the plaintiffs' claim(s) for relief and thus subject to review under 28 U.S.C. § 1292(b)....
>
> In any case, the burden of pleading a complaint in accordance with the Federal Rules of Civil Procedure is, obviously, the plaintiff's burden. *Id.* at 1522. But if the plaintiff, whether deliberately or through sheer incompetence, fails to present a complaint framed as the rules require, e.g., "to provide a short, clear, and concise statement of the claim," *id.* at 1522 n.103, then the burden shifts to the trial judge; acting *sua sponte*, the judge should require a repleader, *id.* In the instant case, plaintiffs' counsel has not followed the rules. We need not say more.

(11th Cir. No. 91-2061, May 8, 1991, unpublished; emphasis in original).

The District Court then dismissed the complaint with leave to amend. The plaintiffs filed an amended complaint, which was still in one count, still contained one global set of rambling factual allegations, still invoked various constitutional buzzwords in passing, and was even longer than the original complaint. The amended com-

plaint was most notable for its similarity to the original; some passages had been moved from one paragraph to another, and some additional rambling allegations had been added, but otherwise the amended complaint was virtually identical to the original, which had already been found to be deficient.

The defendants moved to dismiss the amended complaint. Among the grounds asserted were that the amended complaint was still not in compliance with the Federal Rules of Civil Procedure, and that the individual defendants were shielded by qualified immunity. The District Court denied that motion, without mentioning qualified immunity. The individual defendants appealed to the United States Court of Appeals for the Eleventh Circuit, under 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The Court of Appeals reversed in part, affirmed in part, and remanded. *Oladeinde v. City of Birmingham*, 963 F.2d 1481, *reh'g and reh'g en banc denied*, 978 F.2d 718 (11th Cir. 1992).

As to the adequacy of the amended complaint under the Rules of Civil Procedure, the Court of Appeals first noted that "Many factors complicate our review of defendants' . . . claims, but no factor plays as dominant a complicating role as the long and wordy nature of plaintiffs' amended complaint." 963 F.2d at 1484. The Court continued, "We are perplexed and frustrated by the fact that, despite clear guidance from this Court, 'the complaint presented to us . . . [continues to be] a typical "shotgun" pleading.'" *Id.* (bracketed material in original; quoting unreported decision discussed above).

Though the Court of Appeals "admitt[ed] to serious doubt that the complaint complies with Rule 8," 963 F.2d at 1484, it nonetheless declined to order a dismissal of the amended complaint based on this inadequate pleading; the reasons given were that the case had been before

the Court twice previously and "the interest of judicial economy and efficiency." *Id.*

The Court of Appeals continued with precatory admonitions to the district courts and to litigants, that proper pleading is particularly necessary in § 1983 cases, particularly when qualified immunity is involved. These precatory admonitions were not given any force in the present case, despite the Court's complaint that "we had anticipated that [this rule] would be rigorously applied by the district court in this case, particularly in light of our earlier decision denying defendants' appeal." *Id.* at 1485.

The Court of Appeals then addressed qualified immunity as it affected the various claims which could, with some effort, be inferred from the amended complaint. The Court ordered the dismissal of any "equal protection" or "freedom of association" claims; no facts had been stated to support any such claim (much less any violation of clearly established law). *Id.* The Court similarly ordered the dismissal of any "due process" claim, whether for deprivation of a "property" or "liberty" interest, or for "substantive" due process. *Id.* at 1485-86.

This apparently left only a "free speech" claim under 42 U.S.C. § 1983 and the First Amendment to the United States Constitution. The Court ordered the dismissal of any such claim against Mayor Arrington, for failure to state any facts supporting such a claim against the Mayor. *Id.* at 1486-87. The Court, however, affirmed the district court's refusal to dismiss the "free speech" claim against Chief Deutcsh, Captain Webb, and Captain Walker in their individual capacities.

The defendants' petition for rehearing, or rehearing en banc, was denied on October 30, 1992. The only claim remaining is a "free speech" claim, and that only against the City, Chief Deutcsh, Captain Webb, and Captain Walker. This petition for writ of certiorari is brought

to spare those defendants, and particularly the individuals, from the burdens of suit and the threat of liability on a claim which is so poorly pleaded as to be incomprehensible.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION.

This petition involves the interplay between the pleading standard of Federal Rule of Civil Procedure 8 and qualified immunity. This interplay has previously been before the Court in *Siegert v. Gilley*, —— U.S. ——, 111 S.Ct. 1789 (1991), though the Court found it unnecessary to reach the issue there; related issues are involved in *Leatherman v. Tarrant County Narcotics Unit*, No. 91-1657, presently pending before this Court.

The interplay between Rule 8 and the policies of qualified immunity has led to the "heightened pleading" doctrine in § 1983 cases against individual defendants. *See Siegert v. Gilley*, —— U.S. at ——, 111 S.Ct. at 1795 (Kennedy, J., concurring in the judgment) ("The heightened pleading standard is a necessary and appropriate accommodation between the state of mind component of malice and the objective test that prevails in qualified immunity analysis as a general matter.").

This case is unlike some "heightened pleading" cases, in which the defendant merely argues that the plaintiff has set forth too few facts to overcome his qualified immunity. In this case, we point out not only that the facts pleaded are insufficient to overcome the defendants' immunity; we say, furthermore, that the facts pleaded are not comprehensible enough to give the defendants notice of what they are alleged to have done. This case, then, is not merely about how much the plaintiffs have pleaded, but also how well. As such, it has far-reaching impact not only on § 1983 claims, but on all other civil litigation as well.

Some courts have applied the "heightened pleading" doctrine in suits against public entities, as well as public officials; this Court will address that issue in *Leatherman v. Tarrant County*, No. 91-1657. It is possible that this case should be remanded for reconsideration in light of *Leatherman* after that case is decided. But, as shown below, the necessity of proper pleading in this case is even more important than in *Leatherman*; this case, unlike *Leatherman*, involves qualified immunity and the rights of individual government official defendants not to undergo discovery or stand trial on insubstantial claims.

In short, this case presents issues which the Court has recognized as critical in *Leatherman* and *Siegert*. It presents a perfect opportunity for elaboration of the standard of pleading in § 1983 cases against individual governmental defendants. As *Leatherman* and *Siegert* show, these issues have become the source of substantial confusion and disagreement among the Circuits; we respectfully request this Court to grant a writ of certiorari in this case to provide guidance on these crucial issues.

II. THE AMENDED COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH THE MANDATORY REQUIREMENTS OF FED. R. CIV. P. 8.

Fed. R. Civ. P. 8(a)(2) requires that a complaint "*shall* contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(e) similarly requires that "Each averment of a pleading *shall* be simple, concise, and direct." This Court has recognized that Rule 8(a)(2) is indeed mandatory. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 (1984) (complaint "must contain" a short and plain statement of the claim).

The first error of the Court of Appeals was in its refusal to give effect to this mandatory language. Wihout holding that the amended complaint complied with Rule 8—but after noting "serious doubt that the complaint com-

plies with Rule 8," 963 F.2d at 1484, and indicating that the amended complaint was still "long and wordy," and was still a "typical shotgun pleading," *id.*—the Court allowed the amended complaint to stand. Here, our point is a simple one: if there is "serious doubt" whether a plaintiff has complied with this initial, fundamental, and mandatory prerequisite to suit, the suit cannot proceed unless that "serious doubt" is resolved in his favor. The Court of Appeals erred in ignoring the mandatory aspect of Rule 8.

Furthermore, we submit that the only possible conclusion is that this amended complaint does not comply with Rule 8's mandatory language—especially in light of the Court of Appeals' earlier rejection of the nearly identical original complaint. Whatever else might be said about this amended complaint, it could (as the Court of Appeals recognized, at least impliedly) by no stretch of the imagination be called "short and plain." If the ideal of "notice pleading" is to be made workable, the concept of "notice" must be taken seriously. This complaint gives no notice of what each defendant is charged with, but leaves them wondering just what this case is about and what each is alleged to have done.

We emphasize that this is not merely of concern to the defendants in this case; to the contrary, respect for the mandatory language of Rule 8 is an integral part to any resolution of the well-recognized problems in federal civil litigation. The courts and Congress have, in recent years, noted that civil litigation has become overwhelmingly complicated, expensive, and time-consuming. The Congress has reacted to this problem by enacting the Judicial Improvements Acts of 1990, P.L. 101-650, 104 Stat. 5089, embodying a "national, statutory policy in support of judicial case management." Senate Report No. 101-416 at 14, 10F 1991 U.S. Code Cong. & Adm. News 6802, 6817. The courts have also reacted to this problem by proposed amendments to the Federal Rules of Civil Procedure,

designed to simplify the discovery process and thus make pretrial proceedings more efficient and less expensive. As stated by the Honorable Sam C. Pointer, Jr., Chairman of the Advisory Committee on Civil Rules,

> The various proposals have a common theme and purpose; namely, to change current practices to achieve more effectively the objective stated in Rule 1—the "just, speedy, and inexpensive determination of every [civil] action." Amendments to the rules can and should be made to reduce, if not totally eliminate, the excessive delays and expense involved in many civil cases, particularly in the conduct of discovery, and changes are also needed to make accommodation for the court plans mandated under the Civil Justice Reform Act of 1990. *Curtailment and prompt elimination of frivolous claims and defenses serves not only to reduce the burden on litigants, but also to preserve scarce judicial resources for litigants with disputes requiring more extensive court time and attention.*

See Letter from Hon. Sam C. Pointer, Jr., to Hon. Robert E. Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure, June 13, 1991, at 2, *reprinted in* 112 S.Ct. *269* (emphasis supplied). But these reforms will be for nothing if plaintiffs are allowed to proceed with long, incomprehensible, shotgun complaints; neither the courts, nor the parties, will be able to determine what such a case is about or how it may be managed.

This Court, then, should take this opportunity to emphasize the central role of Rule 8 in making civil litigation work efficiently—and, indeed, in allowing it to work at all.

III. QUALIFIED IMMUNITY INCLUDES AN ENTITLEMENT NOT TO BEAR THE BURDENS OF DEFENDING AGAINST A RAMBLING "SHOTGUN" COMPLAINT.

The individual defendants, in their individual capacities, are of course shielded by qualified immunity. As this Court well knows, one of the core purposes of qualified

immunity is to save such defendants from the burdens of pretrial proceedings, and not merely from trial or the threat of liability. For this reason, this Court has emphasized that qualified immunity issues should be addressed as early as possible, so as to keep public officials from being distracted with the headaches of discovery and other pretrial matters. *See, e.g., Hunter v. Bryant*, —— U.S. ——, ——, 112 S.Ct. 534, 536 (1991).

For this reason, the courts have developed the doctrine of "heightened pleading," as discussed briefly above. That doctrine requires that plaintiffs, when suing government officials in their individual capacity under § 1983, set forth facts adequate to show a particular and specific violation of clearly established law.

In this case, it is perhaps unnecessary to impose a "heightened pleading requirement," in the sense of requiring that plaintiffs plead more specifics than sometimes required in a mundane case (though we do submit that such a requirement is appropriate). All this Court must impose, in order to vindicate our right to immunity in this case, is a "proper pleading" requirement—that is, an especially strict attention to the requirements of Fed. R. Civ. P. 8(a)(2) and 8(e)(1) in suits against government officials in their individual capacities.

It is obvious that a long, rambling, and poorly pleaded "shotgun" complaint imposes additional burdens on defendants; they must engage in lengthy discovery simply to gain an understanding of why they are being sued. Such pleading also undermines the role of Federal Rule of Procedure 12(b)(6); when a complaint is long and confusing, it is all the more difficult to determine whether it states any sort of claim upon which relief can be granted. In short, poor pleading (if tolerated) allows plaintiffs to impose heavy pretrial burdens on defendants, even in the most mundane civil case. The basic purpose of qualified immunity, on the other hand, is to protect government

officials from these precise burdens. *See, e.g., Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, —— U.S. ——, ——, —— S.Ct. ——, —— (1993) (noting that the "central benefits of qualified immunity" are "avoiding the costs and general consequences of subjecting public officials to the risks of discovery and trial.").

The decision of the Court of Appeals is in error, in that it pays too little attention to the burdens which "shotgun" litigation imposes on government officials and the governments they serve. The Court of Appeals in this case decided to let the incomprehensible complaint stand, on the grounds of "judicial efficiency." But this Court's opinions teach that judicial efficiency is not the only sort of efficiency at issue in this sort of case; governmental efficiency, for the defendants, is equally important. To allow complaints such as this to stand will simply increase the burdens of baseless litigation against local governments and their officials.

For these reasons, this Court should take this opportunity to emphasize the necessity of strict attention to the requirements of Fed. R. Civ. P. 8 in cases against government officials sued in their individual capacity.

IV. WHEN PLAINTIFFS WITH EXPERIENCED COUNSEL TWICE FAIL TO PLEAD IN CONFORMITY WITH THE RULES OF CIVIL PROCEDURE, DESPITE INSTRUCTIONS FROM THE COURTS, THEIR COMPLAINT AGAINST GOVERNMENT OFFICIALS MUST BE DISMISSED WITH PREJUDICE.

As set forth above, the plaintiffs were given a second opportunity to plead their case correctly. They were given explicit directions as to the inadequacies of their first effort. That inadequacy was, primarily, that the complaint was in one count (though it appeared to attempt to make any number of separate claims against various defendants) and that it contained a rambling set of factual

allegations that might or might not be relevant to any or all of the various claims. Nonetheless, the plaintiffs doggedly ignored these instructions from the Court of Appeals, and filed an amended complaint which indisputably suffers from these same flaws.

In such a situation, the Complaint must be dismissed with prejudice—especially when, as now, the defendants are a local government and its officials sued in their individual capacities. It is not difficult for experienced counsel (such as those who represent the plaintiffs) to frame a complaint in compliance with the Federal Rules of Civil Procedure. It is not difficult to obey the directives of a federal Court of Appeals, when it points out the deficiencies in a party's pleading. The plaintiffs' willful failure to comply with the Rules and directions of the Court of Appeals must result in a dismissal of their complaint with prejudice. To allow them a third bite at the apple would merely compound the burdens on the defendants, whose immunity should already have spared them from the necessity of defending this suit.

The Court of Appeals implied that its only options, when faced with the plaintiffs' repeated failure to comply with Fed. R. Civ. P. 8, were (1) to remand for repleading, or (2) to forgive the plaintiffs entirely. 963 F.2d at 1484. In this, there is an apparent conflict with the decisions of other Circuits, which make clear that a third option is available and appropriate: dismissal with prejudice. *See, e.g., Mangan v. Weinberger*, 848 F.2d 909 (8th Cir. 1988); *Schmidt v. Herrman*, 614 F.2d 1221 (9th Cir. 1980); *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671 (9th Cir. 1981) (affirming such a dismissal and sanctioning appellant); *Prezzi v. Schelter*, 469 F.2d 691 (2d Cir. 1972), *cert. denied* 411 U.S. 935 (1973).

This Court should take this opportunity to instruct the lower courts on the proper response to litigants' repeated

refusals to comply with the pleading requirements of Fed. R. Civ. P. 8.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-7518

VALINDA F. OLADEINDE, PATRICIA L. FIELDS,
Plaintiffs-Counterclaim
Defendants-Appellees,

v.

CITY OF BIRMINGHAM, a municipal corporation, RICHARD ARRINGTON, individually and in his capacity as Mayor of the City of Birmingham, ARTHUR DEUTSCH, individually and in his capacity as Chief of Police of the City of Birmingham, JULIUS WALKER, individually and in his capacity as Provisional Captain of Administrative Vice-Narcotics Division, R.L. WEBB, individually and in his capacity as Provisional Captain of Internal Affairs Division,

Defendants-Counterclaim
Plaintiffs-Appellants,

DAVID BARBER, ROGER BROWN, UNITED STATES OF AMERICA, STATE OF ALABAMA,
Movants.

Appeal from the United States District Court
for the Northern District of Alabama

June 24, 1992

Before EDMONDSON and COX, Circuit Judges, and MERHIGE*, Senior District Judge.

EDMONDSON, Circuit Judge:

Defendants, sued under 42 U.S.C. § 1983, appeal the district court's order denying their motion to dismiss based, among other things, on qualified immunity. We reverse in part and affirm in part.

BACKGROUND

Plaintiffs, Valinda F. Oladeinde and Patricia L. Fields, are Birmingham Police Department officers who filed a section 1983 action against the City of Birmingham, Birmingham Mayor Richard Arrington, Birmingham Police Chief Arthur Deutsch, Provisional Captain Julius Walker of the Vice-Narcotics Division of the Birmingham Police Department and Provisional Captain R.L. Webb of the Department's Internal Affairs Division. (Excluding the City, defendants were sued in their official and individual capacity.) Plaintiffs alleged that defendant violated plaintiffs' rights to free speech, due process, equal protection and freedom of association by retaliating against plaintiffs' "whistleblowing" about wrongdoing in the Police Department.[1]

Defendants moved unsuccessfully to dismiss the original complaint and then moved for dismissal again after some discovery and pretrial proceedings. The district court denied this second motion, but certified the denial order for interlocutory appeal. This court denied permission to ap-

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* Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

[1] Plaintiffs also raised state-based tort claims.

peal; we were unable to determine what question of law might control plaintiffs' claims because plaintiffs' complaint was a 'shotgun" pleading containing rambling facts and multiple claims for relief all under one count and because we were unable to determine from the district court's order whether the district court ruled on a question of law. *See Oladeinde v. City of Birmingham*, No. 91-2061 (11th Cir. filed May 8, 1991).

The case went back to the district court, which allowed plaintiffs to amend their complaint. Defendants again moved for dismissal after plaintiffs amended their complaint; the motion to dismiss was based on these grounds: (1) complaint's failure to conform to Fed.R.Civ.P.8; (2) complaint's failure to state a claim for which relief might be granted; (3) the substance of the alleged wrongful activity was privileged from discovery; (4) qualified immunity; and (5) for the state-law claims, defendants' argument that the district court should exercise no pendent jurisdiction.

The district court denied defendants' motion with the following brief statement:

> Defendants evidently got carried away by the Eleventh Circuit's comments by way of dicta and citation to *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir.1991) [(condemning "shotgun" pleadings), *cert. denied*, —— U.S. ——, 112 S.Ct. 167, 116 L.Ed.2d 131 (1991)]. This court is satisfied that plaintiffs' complaint falls comfortably in between what would be required by strict common law pleading and "shotgun" or nebulous and vague pleading so as to find acceptance under the notice pleading requirements of the federal rules.
>
> In addition, defendants' motion to dismiss appears to be fired out of the same or a similar shotgun from which they accuse plaintiffs of firing. In any event

none of the grounds or rounds fired are sufficient to justify a grant of the motion to dismiss.

Oladeinde v. City of Birmingham, No. 91-AR-0196-S (N.D.Ala. filed June 2, 1991). Apart from stating that plaintiffs' complaint met federal civil procedure pleading requirements, the district court never explained why it rejected defendants' other grounds for dismissal. This appeal by the individual-capacity defendants followed.

DISCUSSION

Defendants argue that the district court erred by concluding that plaintiffs' complaint conformed to procedural rules, by concluding that plaintiffs' complaint stated a claim for which relief might be granted, and by rejecting defendants' qualified-immunity defense.[2] Many factors complicate our review of defendants' three claims, but no factor plays as dominant a complicating role as the long and wordy nature of plaintiffs' amended complaint.

In all kinds of cases, pleadings should be "simple, concise, and direct." Fed.R.Civ.P.8(e)(1).[3] We are perplexed and frustrated by the fact that, despite clear guidance from this court, "the complaint presented to us . . . [continues to be] a typical 'shotgun' pleading." *Oladeinde v. City of Birmingham*, No. 91-2061, slip op. at 2 (11th Cir. filed May 8, 1991). But in the light of the fact that

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[2] We deem abandoned those motion-to-dismiss arguments that defendants advanced in the district court but failed to raise on appeal. *See, e.g., Rogero v. Noone*, 704 F.2d 518, 520 n. 1 (11th Cir.1983).

[3] Rule 8 requires, among other things, that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Although "[e]ach averment of a pleading shall be simple, concise, and direct[,] . . . [n]o technical forms of pleading . . . are required." *Id.* 8(e)(1).

this case is presented to us for the third time[4] (although the case has yet to advance much beyond the initial-pleading stage) and in the interest of judicial economy and efficiency, we will review defendants' claims instead of remanding this case for further repealing. We admit to serious doubt that the complaint complies with Rule 8, but we will not reverse the district court on this point. We reject defendants' first point on appeal.

On a related question about pleadings (whether the complaint states a claim), we want to use this opportunity to repeat that, "in an effort to eliminate non-meritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims, we, and other courts, have tightened the application of Rule 8 to § 1983 cases." *Arnold v. Board of Educ. of Escambia County*, 880 F.2d 305, 309 (11th Cir.1989) (citation omitted). In pleading a section 1983 action, some factual detail is necessary, especially if we are to be able to see that the allegedly violated right was clearly established when the allegedly wrongful acts occurred. We also stress that this heightened Rule 8 requirement—as the law of the circuit—must be applied by the district courts; and we had anticipated that it would be rigorously applied by the district court in this case, particularly in the light of our earlier decision denying defendants' appeal.

Rule 12(b)(6) and Qualified Immunity

At this early stage in the proceedings, the Rule 12 (b)(6) defense and the qualified-immunity defense become intertwined. Under Rule 12(b)(6), defendants can defeat plaintiffs' cause of action if the complaint fails "to

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[4] *See Oladeinde v. City of Birmingham*, Nos. 91-2061 & 91-2063 (11th Cir. filed May 8, 1991) (denying permission to appeal and denying mandamus petition); *Oladeinde v. City of Birmingham*, No. 91-7530 (11th Cir. filed July 29, 1991) (denying mandamus petition and granting stay pending appeal).

state a claim upon which relief can be granted." Fed. R.Civ.P. 12(b)(6).[5] Under the qualified-immunity defense, defendants are immune from liability and even from trial if plaintiffs' complaint fails to state a violation of "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). And as the Supreme Court has stated, "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, —— U.S. ——, ——, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991).

When reviewing motions to dismiss, we follow the same standards as the trial courts. All well-pleaded facts in plaintiffs' complaint and all reasonable inferences drawn from those facts are taken as true. *See, e.g., Stephens v. Department of Health and Human Servs.*, 901 F.2d 1571, 1573 (11th Cir.1990). Guided by this standard and by the heightened specificity requirement of Rule 8 in section 1983 cases, we now address plaintiffs' claims. We will first discuss plaintiffs' separate claims and then discuss how plaintiffs' surviving claims affect defendants in their individual capacity.

Separate Claims

We can immediately dispose of two claims contained in plaintiffs' complaint: equal protection and freedom of association. Our review of the complaint and relevant case law shows that no set of facts alleged support either

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[5] In asserting their Rule 12(b)(6) motion to dismiss for failure to state a claim, we note that defendants have attacked the validity of each constitutional claim allegedly asserted in plaintiffs' complaint. *See, e.g.*, Defendants' Motion to Dismiss at 15-23.

of these two claims. This conclusion is made even easier by plaintiffs' counsel's admission during oral argument that she was "persuaded" by defendants' arguments and by applicable case law that the alleged equal-protection and freedom-of-association claims were legally unsupportable and that, if given the chance, she would "not include" these claims in another amended complaint. Plaintiffs, then, have concededly failed to state equal-protection and freedom-of-association claims for which relief might be granted.

Plaintiffs have also failed to state a due-process claim for which relief might be granted. Plaintiffs' complaint alleges that plaintiff Oladeinde's reputation was soiled, that plaintiffs Oladeinde and Fields were transferred for no good reason, and that plaintiff Oladeinde was denied a promotion. None of these allegations implicate the due-process protection of the Fourteenth Amendment.

We first examine whether plaintiffs alleged a violation of their procedural due-process rights. When reviewing a due-process claim, the threshold question is whether plaintiffs were deprived of a protected property or liberty interest. *See, e.g., Faucher v. Rodziewicz*, 891 F.2d 864, 869 (11th Cir.1990). Our inquiry will start with the only allegation affecting both plaintiffs: the transfers. Because we continue to be unwilling to hold that a transfer, which involves no loss of pay and no loss of rank, deprives a plaintiff of a protected liberty or property interest, we conclude that plaintiffs have alleged no procedural due-process violation on this point. "The internal transfer of an employee, unless it constitutes such a change of status as to be regarded essentially as a loss of employment, does not provide the additional loss of a tangible interest" that deserves Fourteenth Amendment protection. *See Faucher*, 891 F.2d at 870 (citation omitted).

We also conclude that the alleged defamatory remarks made about plaintiff Oladeinde fall outside the protection

of constitutional due process. Plaintiff Oladeinde tries to rely on *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), to argue that allegations of criminal acts may invoke due-process protection. This reliance is misplaced, however, because plaintiff in *Owen* had been discharged immediately following, and presumably because of, the allegedly false statements. *Id.* at 633 n. 13, 100 S.Ct. at 1406-07 n. 13. Here, no loss of income or rank occurred, and absent a discharge or more, injury to reputation itself is not a protected liberty interest. *See, e.g., Siegert v. Gilley*, —— U.S. at ——, 111 S.Ct. at 1794.

Plaintiff Oladeinde's promotion is also not a protected property or liberty interest. In *Wu v. Thomas*, 847 F.2d 1480, 1485 (11th Cir.1988), this court stated that "a prospective promotion is not a property or liberty interest protected by the fourteenth amendment." Here, no protected interest arose from the mere recommendation of a promotion.

Aside from failing to state a claim for a violation of procedural due-process rights, plaintiffs have also failed to state a claim for a violation of substantive due-process rights. Substantive due process is a difficult concept to define. But "substantive due process is violated *only* when the government engages in actions which 'offend those canons of decency and fairness which express the notions of justice. . . .' " *Faucher*, 891 F.2d at 871 (citations omitted). Unless the alleged conduct by the state actor shocks the conscience, substantive due process is not implicated. *Id.* Here, no shocking conduct was alleged, no substantive due-process rights were violated, and no due-process claim was stated for which relief might be granted.

Plaintiffs, however, have successfully stated a free-speech claim for which relief *might* be granted. Bearing in mind that all facts alleged in the complaint and all reasonable inferences drawn from those facts must be

taken as true on a motion to dismiss, *see, e.g., Stephens*, 901 F.2d at 1573, plaintiffs have alleged the following: before, during and after their time in the Birmingham Police Department Narcotics Unit, plaintiffs sought to expose allegedly corrupt connections between police, city officials and drug dealers; and, as a result of these efforts, plaintiffs were exposed to retaliatory harassment, threats and transfers to keep them quiet about affairs that might be a matter of public concern. In essence, plaintiffs allege that they are "whistleblowers" and that defendants violated plaintiffs' free-speech rights by retaliating against them for their efforts. Taking these allegations as true, plaintiffs have stated a free-speech claim for which relief *might* be granted. *Cf. Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 n. 2 (11th Cir.1989) (First Amendment protects public employees' right to speak about issues of public concern).

Although plaintiffs have successfully stated a free-speech claim, they have stated this claim only against three of the individual-capacity defendants: Deutsch, Walker and Webb. Nowhere do plaintiffs allege particular wrongful acts by Mayor Arrington and nowhere do plaintiffs allege a sufficient causal connection between the alleged free-speech violation and the Mayor's conduct. Absent these allegations, plaintiffs' complaint fails to state a section 1983 claim against the Mayor. *See, e.g., Hansen v. Black*, 885 F.2d 642, 645-46 (11th Cir. 1989).

Plaintiffs came closest to alleging the Mayor's involvement when plaintiffs made the following statements in their complaint: "As a result of plaintiffs' [whistleblowing], defendants Webb, Walker, Deutsch and Arrington took certain actions in an effort to punish, harass, and intimidate such 'whistleblowers. . . .'" Plaintiffs' Amended Complaint at 7. para. 20; and "Defendants illegally conspired to violate plaintiffs' rights. . . ." *Id.* at 18, para. 43. In the light of the heightened specificity requirements for Rule 8 in section 1983 cases, we look for definiteness in

the averment of wrongful acts. These vague allegations, which are supported by no specific specific factual allegations against the Mayor, constitute no basis for a section 1983 cause of action. The district court, therefore, should have dismissed the claims against the Mayor.

Defendants in their Individual Capacity

We now address the question whether the remaining individual-capacity defendants are entitled to qualified immunity against plaintiffs' free-speech claim. We conclude that, based on the record before us, Deutsch, Walker and Webb are unentitled to qualified immunity *at this stage* in the proceedings.

Defendants correctly argue that, in free-speech case, "[b]ecause no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where [the balancing test from *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (free-speech interest of employee must be weighed against employer's interest in performing public services efficiently)], would lead to the inevitable conclusion that the [retaliatory action] was unlawful." *Dartland*, 866 F.2d at 1323. *Dartland* is the law. But considering the complaint only, this appears to be a case in which such an inevitable conclusion would be reached. Therefore, at this stage in the proceedings, the qualified-immunity defense of Deutsch, Walker and Webb fails because the limited record before us does not support defendants' contention that, in the light of prevailing legal standards, their interest in efficiently operating the police department arguably outweighed plaintiffs' free-speech rights on a matter of public concern. We stress, however, that defendants retain the right to assert the qualified-immunity defense at the next stage of the proceedings (and, for that matter, throughout the proceedings) as more facts are developed.

CONCLUSION

Because plaintiffs' complaint fails to state at claim for which relief might be granted on the assertions that defendants violated plaintiffs' rights to due process, freedom of association and equal protection and because plaintiffs' complaint fails to state a claim against Mayor Arrington, we REVERSE the district court's denial of defendants' motion to dismiss these claims. But we AFFIRM the district court's decision in all other respects.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 91-AR-0196-S

VALINDA F. OLADEINDE, *et al.*,
Plaintiffs

vs.

CITY OF BIRMINGHAM, *et al.*,
Defendants

OPINION AND ORDERS

[Filed Apr. 5, 1991]

Not previously addressed by the court are the following motions listed in the order of their filing:

1. Motion filed on March 28, 1991, by the United States for reconsideration of this court's order of March 26, 1991, which overruled the United States' objections to the magistrate judge's ruling of March 25, 1991, ordering the United States witnesses, Donaldson, Earnest and Barnett, to submit to deposition by defendants; or, in pursuant to 28 U.S.C. § 1292(b).

2. Motion filed on March 28, 1991, by the United States, seeking a stay of this court's order of March 26, 1991, in the event this court should deny the first alternative in the motion described in paragraph 1 but grant the second alternative, i.e., a certification for interlocutory appeal.

3. Motion filed on March 29, 1991, by defendants for a release to them of portions of the *in camera* transcripts or, in the alternative, for their own *in camera* conference with the court.

4. Motion filed on March 29, 1991, by defendants, as amended on April 2, 1991, seeking a stay of the proceedings, or, in the alternative, for an order *in limine*, or, in the alternative, for reconsideration of this court's order entered on March 25, 1991, protecting certain informants from being revealed to defendants, or, in the alternative, to certify the order of March 25, 1991, for appeal pursuant to 28 U.S.C. § 1292(b).

5. Motion filed on April 4, 1991, by defendants to dismiss the action; or, in the alternative, if the motion to dismiss is denied, to certify the denial for appeal pursuant to 28 U.S.C. § 1292(b).

All parties, including the United States, which is a vitally interested collateral party, apparently agree that certain issues which have been ruled upon or which will be ruled upon in this opinion, are so crucial to matters of public policy and to the outcome of this case that they should be passed upon by the Court of Appeals prior to any further activity by this court or the parties in the case. Both the United States and defendants have moved for a stay and for the opportunity to take interlocutory appeals in the event the court continues to disagree with them on certain issues. Plaintiffs have not opposed these requests, obviously not being eager to proceed toward a possibly abortive jury resolution of the ultimate issue, a resolution which would be much more vulnerable on appeal than would the average jury verdict. Were the matters here in dispute not highly unique and important to the public as a whole as well as to the parties themselves, to the extent that the early rulings may have the effect of letting an unrecoverable horse out of the barn, this court would deny a stay and would proceed on the fast track initially promised, but this case has turned

into a case for the invocation of 28 U.S.C. § 1292(b), if there is ever to be such a case. Several threshold issues are both serious and very possibly dispositive.

Insofar as the motions of the United States and of defendants seek a reconsideration of this court's prior rulings and of the prior rulings of the magistrate judge not already reviewed by this court, the said motions are DENIED. The court is fully mindful of the theory of the United States, as articulated in *Flynn v. Church of Scientology*, 116 F.R.D. 1 (D. Mass. 1986), which admittedly holds that a United States attorney is immune from third-party interrogation with respect to information criminal investigation, but which is distinguishable. There is no expression on this subject from the Eleventh Circuit or from the Supreme Court. This court, as was the magistrate judge, is also fully mindful of the possible implications of 28 C.F.R. § 16.21 *et seq.*, as a procedural *sine qua non* for the exposure of United States attorneys to third-party discovery. This case requires a consideration of conflicting public policies, including the requirements of "due process" for both parties in the area of discovery. For instance, in fairness can defendants be limited in their inquiry into what the United States attorneys may have agreed to in relation to plaintiffs as those agreements bear on plaintiffs' § 1983 claims, and if there can be limitations, what are they? It is for these reasons that this court directed the magistrate judge actually to preside over the depositions of the United States attorneys when and if taken by defendants.

The motion of defendants to provide them access to *in camera* materials, or, in the alternative, to allow an *in camera* conference with the court is DENIED.

The motion of defendants for an order *in limine* is DENIED.

The motion of defendants for a dismissal of the action is DENIED.

Both the motion by the United States and the motion by defendants to certify certain questions for review by the Court of Appeals for the Eleventh Circuit are GRANTED. To this end, and pursuant to 28 U.S.C. § 1292(b), the court EXPRESSLY FINDS that its orders in the certain separate and several particulars hereinafter more fully described involve controlling questions of law as to which there is substantial ground for difference of opinion, and that immediate appeals from those orders or from some of them, may materially advance the determination of the litigation. It is the intention of the court to certify these questions separately and severally for interlocutory appeal. The orders which, in the opinion of this court, fit this category are those orders (a) which overrule defendants' motion to dismiss the action based on the denial to defendants of access to discovery materials which defendants insist are crucial to their defense; (b) which overrule defendants' motion to dismiss based on this court's opinion that under the Task Force arrangement in effect between the United States and defendant City of Birmingham, plaintiffs had the right to choose to give paramount loyalty to the United States rather than to the defendant City and to its superior police officials; (c) which deny defendants access to *in camera* materials and to the names of certain confidential informants; and (d) which deny the attorneys for the United States complete protection from being deposed by defendants as to matters which, in the opinion of the United States, might compromise allegedly ongoing criminal investigations or might reveal grand jury evidence or, in the alternative, might constitute a violation of 28 C.F.R. § 16.21 *et seq.*

* * *

In the event any interested party or parties addresses a timely motion to the Court of Appeals for the Eleventh Circuit for leave to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the Clerk shall transmit to the Court of Appeals the full transcript of all materials on

file, including the testimony of hearings before the magistrate judge and before this court, and specifically including the *in camera* materials which shall be sent under separate cover UNDER SEAL. The United States, being a non-party, has made known its intention to file a petition for writ of mandamus to present by alternative means to the Court of Appeals the same issues which it will present under a proposed interlocutory appeal pursuant to § 1292 (b), the United States and defendants alike being desirous of obtaining a final appellate expression on the exposure of the government's criminal investigation file prior to its actual exposure and possible inevitable effect.

Under these circumstances, both motions for a stay of the proceedings are GRANTED. All pleadings and discovery in this case are hereby ORDERED discontinued until the Court of Appeals acts upon any and all timely attempts at taking an interlocutory appeal and/or filing a petition for writ of mandamus.

DONE this 5th day of April, 1991.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 91-AR-0196-S

VALINDA F. OLADEINDE, *et al.*,
Plaintiffs

vs.

CITY OF BIRMINGHAM, *et al.*,
Defendants

ORDER

[Filed June 25, 1991]

The court has for consideration a motion by defendants in the above-entitled cause to dismiss plaintiffs' amended complaint. The motion is DENIED, and defendants are hereby ORDERED to answer the amended complaint within ten (10) days.

Defendants evidently got carried away by the Eleventh Circuit's comments by way of *dicta* and citation to *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991). This court is satisfied that plaintiff's present complaint falls comfortably in between what would be required by strict common law pleading and "shotgun" or nebulous and vague pleading so as to find acceptance under the notice pleading requirements of the federal rules.

In addition, defendants' motion to dismiss appears to be fired out of the same or a similar shotgun from which they accuse plaintiffs of firing. In any event, none of the

grounds or rounds fired are sufficient to justify a grant of the motion to dismiss.

The parties should set themselves to resume discovery, which had been suspended only pending the outcome of this motion. All previous orders regarding confidentiality and limitations on discovery are still in place.

DONE this 25th day of June, 1991.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-2061

VALINDA F. OLANDEINDE and PATRICIA L. FIELDS,
Plaintiffs-Counterclaim-Defendants-Respondents,

versus

CITY OF BIRMINGHAM, a municipal corporation, RICHARD ARRINGTON, individually and in his capacity as Mayor of the City of Birmingham, ARTHUR DEUTSCH, individually and in his capacity as Chief of Police of the City of Birmingham, JULIUS WALKER, individually and in his capacity as Provisional Captain of Administrative Vice-Narcotics Division, R. L. WEBB, individually and in his capacity as Provisional Captain of Internal Affairs Division,

Defendants-Counterclaim-Plaintiffs-Petitioners,

DAVID BARBER, ROGER BROWN,
UNITED STATES OF AMERICA,
STATE OF ALABAMA,
Movants-Respondents.

Application for Permission to Appeal
U.S. District Court
for the Northern District of Alabama

[Filed May 8, 1991]

Before TJOFLAT, Chief Judge, FAY, and BIRCH, Circuit Judges.

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is DENIED, with this explanation. The complaint, as amended, in this case—i.e., the complaint presented to us with the petition—is a typical "shotgun" pleading, *see Pelletier v. Zweifel*, 921 F.2d 1465, 1518-19 (11th Cir. 1991), in that, in *one* count, the plaintiffs have presented multiple claims for relief, supporting them with a rambling set of factual allegations that may or may not be relevant to each claim. Accordingly, it is virtually impossible for us to know what "question of law" might be "controlling" with respect to the *merits* of the plaintiffs' claim(s) for relief and thus subject to review under 28 U.S.C. § 1292(b). In fact, we cannot even tell from the order sought to be reviewed whether the district court actually ruled on a question of law that might control the decision on the merits.

In any case, the burden of pleading a complaint in accordance with the Federal Rules of Civil Procedure is, obviously, the plaintiff's burden. *Id.* at 1522. But, if the plaintiff, whether deliberately or through sheer incompetence, fails to present a complaint framed as the rules require, e.g., "to provide a short, clear, and concise statement of the claim," *id.* at 1522 n.103, then the burden shifts to the trial judge; acting *sua sponte*, the judge should require a repleader, *id.* In the instant case, plaintiffs' counsel has not followed the rules. We need not say more.

APPENDIX E

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-7518

VALINDA F. OLADEINDE, PATRICIA L. FIELDS,
Plaintiffs-Counterclaim
Defendants-Appellees,

versus

CITY OF BIRMINGHAM, a municipal corporation, RICHARD ARRINGTON, individually and in his capacity as Mayor of the City of Birmingham, ARTHUR DEUTSCH, individually and in his capacity as Chief of Police of the City of Birmingham, JULIUS WALKER, individually and in his capacity as Provisional Captain of Administrative Vice-Narcotics Division, R. L. WEBB, individually and in his capacity as Provisional Captain of Internal Affairs Division,

Defendants-Counterclaim
Plaintiffs-Appellants,

DAVID BARBER, ROGER BROWN,
UNITED STATES OF AMERICA,
STATE OF ALABAMA,

Movants.

On Appeal from the United States District Court
for the Nothern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion June 24, 1992)

[Filed October 30, 1992]

Before: EDMONDSON and COX, Circuit Judge, and MERHIGE *, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
United States Circuit Judge

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* Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number CV-91-AR-196-S

VALINDA F. OLADEINDE, PATRICIA L. FIELDS,
Plaintiffs,

vs.

CITY OF BIRMINGHAM, a municipal corporation; RICHARD ARRINGTON; individually and in his capacity as Mayor of the City of Birmingham; ARTHUR DEUTSCH, individually and in his capacity as Chief of Police of the City of Birmingham; JULIUS WALKER, individually and in his capacity as Provisional Captain of Administrative Vice-Narcotics Division; and R.L. WEBB, individually and in his capacity as Provisional Captain of Internal Affairs Division,

Defendants.

AMENDED COMPLAINT

1. This is an action for declaratory and injunctive relief, monetary damages, and other relief arising under the First and Fourteenth Amendments to the United States Constitution; Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. 1983.

2. The jurisdiction of this Court is founded upon 28 U.S.C. 1331 and 1343(3) and (4).

3. Plaintiffs also seek to bring independent claims under state law against defendants for intentional infliction of emotional distress.

4. The plaintiffs in this action are over 19 years of age and both are residents of the State of Alabama.

5. The defendants in this action are:

(a) Defendant Arrington, who is, and at all times relevant was, the duly elected Mayor of the City of Birmingham, and the principal executive officer of the said city government. Defendant Arrington is sued in his individual and official capacities.

(b) Defendant Deutsch, who is, and at all times relevant was, the appointed Chief of Police of the said city. Defendant Deutsch is sued in his individual and official capacities.

(c) Defendant Walker, who is, and at all times relevant was, the provisional Captain of Administrative Vice-Narcotics Division of the Birmingham Police Department. Defendant Walker is sued in his individual and official capacities.

(d) Defendant Webb, who is, and at all times relevant was, the provisional Captain of the Internal Affairs Division of the Birmingham Police Department. Defendant Webb is sued in his individual and official capacities.

(e) Defendant City of Birmingham is a municipal corporation of the State of Alabama.

6. The individual defendants are over 19 years of age and all reside in Jefferson County, Alabama.

7. Plaintiff Oladeinde is an employee of the Birmingham Police Department. Her employment with the City commenced on July 21, 1981, as a patrol officer. On November 28, 1985, she was promoted to the rank of sergeant and subsequently assumed supervisory responsibilities in the Narcotics Unit of the Birmingham Police Department. Plaintiff Oladeinde has served for the past five years as sergeant over a narcotics team in the narcotics unit. On January 25, 1991, she was transferred to

the South Precinct and assigned duties as a patrol sergeant.

Plaintiff Fields, the City's first female patrol officer, is a 20-year veteran of the Birmingham Police Department. Since March 1989, plaintiff Fields has performed duties as a member of the narcotics team in the Narcotics Unit over which plaintiff Oladeinde was team leader. On January 31, 1991, plaintiff Fields was transferred to the Crimes Against Property-Burglary Division.

9. Pursuant to their duties within the Narcotics Unit, plaintiffs were assigned duties in the Federal Organized Crime Drug Enforcement Task Force (hereinafter "Task Force"). The Task Force is composed of a number of state and federal agencies devoted to the enforcement of federal and state drug laws. The Birmingham Police Department entered into one or more agreements with the Office of the United States Attorney, agreeing to provide assistance in the investigation and prosecution of drug traffickers.

10. Plaintiffs served on the Task Force during investigations which resulted in drug convictions of Otha Taylor, Mike Ivory, Eric Johnson, Wayne Poole, Jerry Crawford, and Ronnie Hayes, and also in a narcotics investigation which resulted in a money laundering conviction of Curtis Motley, who at the time had construction contracts with the City. Plaintiffs also participated in state and federal prosecutions of David Swanson, who was at that time Chairman of the City's Zoning Board. During the course of those investigations, plaintiffs uncovered relationships between individuals targeted for Task Force investigations and certain police officers and City officials.

11. In 1988, plaintiff Oladeinde along with Sergeant Ken Williams filed written complaints against certain police officers who had ongoing relationships with known drug dealers. These complaints were based upon internal investigations, surveillance, and information from con-

fidential informants. Plaintiff Oladeinde was never informed whether these complaints were investigated by Internal Affairs. Plaintiffs, however, did observe that a principal author of these complaints, Sergeant Williams, was subsequently transferred from Narcotics to Homicide and ultimately to the radio room.

12. Again in June of 1990, defendant Webb was informed by plaintiff Oladeinde of these complaints during a joint meeting with representatives from the Task Force and Birmingham's Narcotics Unit. The allegations of internal corruption within the Birmingham Police Department had not been pursued by Internal Affairs. Plaintiffs did observe, however, that Narcotics Lieutenant Bob Berry who attended the joint meeting with her was later transferred to the Patrol Division, East Precinct.

13. In November 1990, during an investigation of a Narcotics Lieutenant, in response to a complaint filed by plaintiff Fields, plaintiff Oladeinde again reported instances of internal corruption to defendant Webb. On this occasion, she reported that certain female police officers were associating with known felons and individuals under investigation for drug trafficking. Although plaintiffs had apprised defendant Webb earlier of these relationships, Webb justified these liaisons, explaining that female Police Officers were dating "dopers" because of a "shortage of men."

14. On another occasion, plaintiff Oladeinde communicated to her supervisors that she had received information that a certain member of her narcotics team was conducting unauthorized searches of "crack houses" for the purpose of confiscating drugs for personal use or sale. In July 1990, she was instructed by her immediate supervisor not to pursue further this information or to conduct an independent investigation concerning these allegations. Plaintiff Oladeinde complied with this order but nonetheless pressed her written correspondence to her supervisors that failure to investigate these allega-

tions may adversely impact on pending cases brought by the United States Attorney or by the District Attorney.

15. Plaintiffs also informed their supervisors of relationships between drug traffickers and certain persons within the City's Finance Department. In correspondence directed to a Narcotics Captain, plaintiff Oladeinde expressed her reservations regarding an audit being performed by an employee in the Finance Department who was on federal deferred prosecution for drug possession. She objected to the manner in which he was conducting an audit of the Narcotics Unit, alterting her supervisors that the individual was copying confidential documents and accessing sensitive information in the computer files.

16. In this correspondence, plaintiff Oladeinde also communicated information regarding a Deputy Finance Director who had been subpoenaed to testify before a federal grand jury regarding his relationship to a convicted drug trafficker.

17. In each of the foregoing instances, plaintiffs were expressing concern over matters of grave public interest, the integrity of city government and its police department.

18. Beginning in 1990, plaintiffs were instructed that they should not assist the Task Force, although such assistance and cooperation was within the line and scope of their duties. On numerous occasions defendant Walker stated that he "hated the feds", and ATF jackets were banned from the premises (referring to a member of the federal Task Force). Walker admitted that in his former capacity with Internal Affairs, on one occasion he intentionally destroyed Internal Affairs records in order to curtail a pending federal investigation. In another instance during 1990, plaintiffs and the Task Force were conducting surveillance on an individual prior to obtaining a search warrant. Defendant Webb has admitted that he forewarned that person of that fact, compromising the investigation and jeopardizing the safety of the officers.

19. Plaintiffs did in fact continue to associate with members of the Task Force and did continue to assist in the investigation of major drug traffickers and persons in City government and in the Police Department who associated with them.

20. As a result of plaintiffs' association with the Task Force and their efforts to disclose improprieties within the municipal government, defendants Webb, Walker, Deutsh and Arrington took certain actions against plaintiffs in an effort to punish, harass, and intimidate such "whistle-blowers." This harassing treatment of plaintiffs increased whenever plaintiffs, working with the Task Force, investigated certain police officers or persons with ties to City government, such as Curtis Motley or David Swanson.

21. Both defendants Webb and Walker became increasingly hostile and intimidating toward plaintiffs. During an investigation instigated by plaintiff Fields against a Narcotics Lieutenant for his alleged involvement with a woman who had been convicted of possession of drugs, defendant Walker warned plaintiff Fields that he—clearly referring to himself—was like "a snake—fixin' to strike".

22. During the period in which plaintiffs, as members of the Task Force, were investigating David Swanson and Curtis Motley, an intensive investigation of the Narcotics Unit was ordered by defendants. This administrative investigation, deemed by defendant Webb as merely a "credibility check", focused heavily not on the Unit but rather upon plaintiff Oladeinde. Over a period of four days, she was subjected to over twelve polygraph examinations, as ordered by defendant Webb. She was further subjected to interrogations regarding the financial records in her unit. And yet, it was plaintiff Oladeinde that had requested in January of 1990 an internal audit of her team and financial training for them to assure proper record keeping. Defendants' intense investigation of Oladeinde's financial records was pretextual. Defendants at all times relevant to this dispute were aware that a former member of the

narcotics unit also had a substantial financial discrepancy in her bookkeeping. This officer, now assigned to Internal Affairs, was never subjected to polygraphs or interrogation regarding "missing funds" under her direction.

23. This administrative investigation was not conducted in a manner consistent with routine administrative investigations of the Police Department. The investigation extended over several months and still may not be "concluded", even though the printed audit contains no allegations of wrongdoing, and merely suggests changes in accounting procedures used by the Narcotics Unit. Contrary to routine practice, Defendant Webb personally conducted the "unit investigation" and personally interrogated plaintiffs. In an uncharacteristic fashion, the investigation was deemed "administrative", and members of Narcotics Unit were assured that no complaint had been filed against any member of the Narcotics Unit. Yet, plaintiff Oladeinde was informed by her supervisors that her reputation was "soiled" and there was "nothing the City could do to repair it". She was openly discussed at roll call and characterized as a thief. (*See* Exhibit A for copy of correspondence sent to defendant Deutcsh apprising him of this oppressive treatment.)

24. Plaintiff Oladeinde has been subjected to oppressive treatment and ordered to redraft memos repeatedly and to draft memos for the purpose of explaining actions that she took with respect to many cases. Plaintiff Oladeinde's efficiency ratings have been lowered. She subsequently was denied a promotion to lieutenant despite the fact that she was recommended for promotion by the Personnel Board and had received numerous awards for her contributions to the Task Force. In other instances, plaintiffs have been discouraged by defendants from pursuing investigations of matters of public concern. Contrary to ordinary practice, plaintiffs have been ordered by defendants to write detailed statements and even to disclose the identity of a confidential informant in a matter with

political ramifications, involving a daughter of the defendant Mayor.

25. Defendants' harassment increased during the Task Force investigation of David Swanson, Chairman of the City's Zoning Board. During this period, plaintiff Oladeinde was ordered by her immediate supervisor to see Donald Watkins, a private attorney and spokesman for the defendant Mayor. In advance of the meeting with Watkins and his legal assistant, Joseph Cole, plaintiff Oladeinde was informed by a Narcotics Lieutenant that the meeting was called by the Mayor due to the pending criminal prosecution of Swanson. Prior to the meeting, defendant Walker corroborated that the meeting was precipitated by plaintiffs' investigation of Swanson. During the meeting held at the North Precinct, Watkins asked her whether "Bill Barnett had asked questions about the "Mayor", referring to a federal prosecutor. He further asked whether the Task Force had made inquiries about the Mayor, black businessmen, and City Hall officials. Defendant Arrington and others in his behalf had been waging a vocal media campaign alleging a conspiracy against them by federal law enforcement personnel. This meeting was intimidating to Plaintiff Oladeinde and was calculated to discourage further investigative efforts.

26. Investigations involving defendant Arrington's daughter also triggered retaliation from defendants. On January 4, 1991, plaintiffs requested a meeting with defendant Walker regarding their intent to convey information to the District Attorney of Jefferson County pertaining to the alleged alteration of certain arrest records of Mayor Arrington's daughter. On that date defendant Walker met with both plaintiffs in his office. At the commencement of the meeting he brandished a derringer, an unauthorized firearm under police regulations. He then without comment positioned the handgun on his desk, pointing the barrel toward plaintiff Oladeinde. Still without comment, he placed two bullets upright alongside the handgun. Defendant Walker refused to authorize such a

meeting with the District Attorney, suggesting instead that plaintiffs could meet with Internal Affairs.

27. On January 7, 1991, a written and verbal report of this incident was given by plaintiffs to a Deputy Police Chief. Only after litigation commenced was an investigation of this incident undertaken. Punishment flowing from this egregious violation of police policies was not suspension or termination, but rather a mere reprimand for "inappropriate behavior." Defendant Walker's display of an unauthorized handgun and his demeanor during the meeting were calculated to intimidate plaintiffs and deter them from communicating information to State prosecutors.

28. On January 8, 1991, Plaintiff Oladeinde was instructed to contact Joseph Whatley, a private attorney for the City of Birmingham in the litigation regarding the altered jail records and the arrest of the Mayor's daughter. On the same day, the said attorney located both plaintiffs at an unrelated trial in Federal Court and questioned each separately at a time in which they were not testifying. The circumstances of these interviews were intimidating to plaintiffs.

29. Shortly thereafter, on January 23, 1991, plaintiff Oladeinde was informed that she was being transferred to the South Precinct as a Patrol Sergeant of the Patrol Division. On the next day, January 24, 1991, plaintiff Fields was told by defendant Walker not to work with the "feds" any more unless the "feds" cleared it through him so that he would know where she was and whom she was investigating. On January 31, 1991, plaintiff Fields was transferred to the Crimes Against Property-Burglary Division. Plaintiff Fields was transferred by defendant Deutsch despite the fact that no position was open in the Burglary division. As a direct result of this transfer, plaintiff Fields no longer is authorized to work with the Task Force. Plaintiff Fields contends that defendants ordered this transfer as a punitive measure because she

sought protection for her First Amendment rights by bringing this action.

30. Plaintiffs contend that their transfers follow a series of actions taken by defendants collectively to harass and intimidate them for the purpose of restricting plaintiffs' freedom of speech and association as protected by the First Amendment of the United States Constitution. Further, the restriction of duties within the Narcotics Unit follows a series of actions taken by defendants collectively to disable and impede plaintiffs from testifying at grand jury and trial proceedings or to investigate internal corruption within City government.

31. Since the filing of this suit, defendants have continued to take actions calculated to harass and to intimidate plaintiffs. On January 31, 1991, plaintiffs were separately interrogated by the Internal Affairs Division regarding the derringer incident with defendant Walker. Both interrogations were audio-taped. Although Internal Affairs was apprised of this incident shortly after its occurrence, defendants chose to "investigate" this incident by questioning the plaintiffs following the commencement of the lawsuit. Plaintiffs contend that the true purpose of this belated investigation is punitive.

32. On February 4, 1991, Sergeant Michelle Wesson, a former member of the Narcotics team supervised by plaintiff Oladeinde, was ordered to the Narcotics Office and was interrogated for approximately five hours by defendant Walker and another supervisor. During this interrogation, they made disparaging remarks concerning the instant suit and impugned plaintiff Oladeinde's mental health. During the investigative phase of this "conference", Wesson was specifically asked why she had recently requested audio and written copies of a taped interrogation conducted in June 1990 by Internal Affairs pursuant to an administrative investigation of the Narcotics Unit. In accordance with police regulations, employees of defendants are to be provided, upon request, a copy of all

statements given pursuant to an administrative investigation. These statements still have not been furnished, and the interrogation was intended to harass those persons perceived by defendants as supportive of plaintiffs.

33. Plaintiffs contend that interrogations of this length and intensity are oppressive and are calculated to harass and discourage individuals, such as Sergeant Wesson and other employees of defendants, from coming forward with information. These "conferences" have a chilling effect upon the exercise of police officers' first amendment rights and, under the guise of conducting legitimate investigations, circumvent the discovery process. Plaintiffs contend that defendants are misusing their positions within the Police Department by deposing key witnesses outside the purview and protection of this Court. Plaintiffs have been denied access to the information revealed during these interrogations. More importantly, the oppressive manner in which they are conducted creates a substantial risk that an inaccurate and distorted statement will be obtained.

34. Defendants have further violated plaintiffs' rights through the enforcement of their Procedure No. 109-22, denominated as Procedures for Civil, Criminal and Miscellaneous Processes in the Birmingham Police Department Rules and Regulations. The purported purpose of this procedure is to establish guidelines for employees concerning civil cases and/or processes. The regulation provides in Section D that "members [of the police force] who are questioned or interviewed in any matter pending before any hearing, trial, council, board, agency, etc. must also notify the Chief of Police at least two (2) business days (excluding weekends)." The regulation further states in Section E that these above-mentioned reports must be "complete, comprehensive, and all-inclusive". The enforcement of the above-stated regulations violates the constitutional rights of all police officers. This regulation would have the obvious effect of inhibiting the plaintiffs from exercising their right of

access to the courts and would have a chilling effect on the ability of Birmingham police officers to discuss confidential or sensitive matters with their own attorneys or with those of plaintiffs. The regulation, a copy of which is attached as Exhibit "B", requires police officers to report any contact with attorneys. The regulation would inhibit plaintiffs' ability to prosecute this case inasmuch as witnesses would be required to report the substance of their discussions with plaintiffs' counsel under threat of disciplinary action. The regulation would grant access to matters normally protected as the work product of plaintiffs' attorneys and would extend to defendants an unfair advantage in pretrial discovery. Additionally, possible witnesses would be reluctant to cooperate with plaintiffs' counsel. The City of Birmingham, through its Police Chief, persists in implementing this oppressive and unconstitutional regulation with full knowledge that it is violative of the constitutional rights of the police officers of the Birmingham Police Department.

35. On February 7, 1991, Officer Ray Tubbs, a member of the Narcotics Team which was formerly supervised by plaintiff Oladeinde, was ordered not to talk with plaintiffs' counsel. Shortly thereafter, the present Team Leader in the Narcotics Unit, informed plaintiffs' counsel that he had been instructed to tell officers in the Narcotics Unit not to talk with plaintiffs' counsel because there may be "repercussions" for violating certain police regulations which restrict the right of police officers to communicate with attroneys or to testify at legal proceedings. Counsel was further informed that if she wished to speak with any member of the Narcotics Unit, then that individual must be subpoenaed.

36. Certain officers who are familiar with the veracity of plaintiffs' claims asserted in this case have indicated that they fear retaliation through the selective application of Police Regulation 109-22, requiring notification of any contact with attorneys. The regulation is especially oppressive in light Defendants have construed the regu-

lation to mean that no city employee may confer with plaintiffs' counsel outside the presence of City attorneys.

37. In communication of February 21, 1991, directed to plaintiffs' attorneys, defendants have threatened judicial sanctions and ethical complaints in the event that plaintiffs' attorneys meet with City employees concerning the claims asserted in this litigation, unless defendants' permission is obtained for such. Such action by defendants is without legal basis, as Alabama appellate courts and the state bar association, particularly in an instance involving the City of Birmingham, have approved such contact. This action by defendants is indicative of the extent to which they seek to intimidate opposing interests and is violative of the constitutional rights of plaintiffs to due process, equal protection and to free speech.

38. The actions of the defendants have violated plaintiffs' rights under the First Amendment. Said action by Defendants has been in retaliation for the exercise of the Plaintiffs' rights of free speech and freedom of association guaranteed under the First Amendment of the Constitution of the United States. Plaintiffs have been singled out and punished for their assistance with the investigation and/or prosecution of matters of extreme public concern. Plaintiffs' ability to speak, comment, testify and associate have been hindered and abridged by the actions of defendants, particularly in regard to matters of concern both to plaintiffs and in violation of the public's right to know about such matters. Defendants' actions have also denied plaintiffs' access to the courts as guaranteed by the First Amendment.

39. The actions of defendants have denied plaintiffs equal protection under the law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs were singled out by defendants and treated differently than similarly situated employees in retaliation for plaintiffs' exercise of their First Amendment rights.

40. Plaintiffs aver that they have been denied due process in that they have been discriminated against for pretextual reasons, without justification or cause, having been done strictly in retaliation for plaintiffs' whistleblowing activities and plaintiffs' association with the task force.

41. The defendants knew, or reasonably should have known, that their actions constituted a violation of plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution. The defendants acted maliciously, willfully, and in wanton disregard of plaintiffs' constitutional rights when they took the aforesaid actions in violation of plaintiffs' civil rights as provided in Section 1983, 42 U.S.C.A.

42. Defendants have unlawfully harassed and sought to intimidate plaintiffs, intentionally inflicting emotional distress upon plaintiffs, taking actions calculated to cause stress and concern over future employability. These actions were undertaken in an environment wherein employees not perceived by defendants as team players have been treated harshly.

43. Defendants illegally conspired to violate plaintiffs' rights and the purpose of this conspiracy was to deprive the plaintiffs of their constitutional rights, and such deprivation did cause injury to the plaintiffs herein.

44. Plaintiffs have been damaged by the violation of their constitutional and statutory rights, the expense of hiring an attorney to defend those rights, inconvenience and emotional distress, including embarrassment, anxiety, and nervousness, resulting from the actions of defendants as complained of herein.

WHEREFORE, THE PREMISES CONSIDERED, Plaintiffs seek the following relief:

(A) Appropriate declaratory and injunctive relief against defendants, whereby plaintiffs will be reinstated to their proper positions of employment with defendants

enjoined from taking further action in violation of their rights. Plaintiffs further seek injunctive relief to protect them from retaliation by defendants or their agents for bringing this action.

(B) Appropriate actual and punitive monetary damages compensating plaintiffs, separately and severally, for the violation of their constitutional and statutory rights.

(C) Plaintiffs seek all costs of this action, including reasonable attorney's fees.

(D) Plaintiffs seek any other, further and different relief to which they may be entitled, the premises considered.

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Plaintiffs demand a trial by jury of all appropriate issues.

/s/ Gayle H. Gear
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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing document on all counsel of record by depositing same in the United States Mail, first class postage prepaid and properly addressed as follows:

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This the 3rd of June, 1991.

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